Connecticut State Medical Society
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Connecticut State Medical Society Testimony in Support of Senate Bill 1028 An Act Concerning The Tolling Of The Statutue Of Limitations For A Negligence Action Brought By A Minor
Judiciary Committee
March 6, 2015

Senator Coleman, Representative Tong and members of the Judiciary Committee, my name is Michael Neubert an attorney who represented physicians and hospitals in medical malpractice cases for over 30 years and have defended numerous cases involving new born babies and minors. Today I am here on be half of the physicians and physicians in training of the Connecticut State Medical Society (CSMS) to testify in opposition to **Senate Bill 1028 An Act Concerning The Tolling Of The Statutue Of Limitations For A Negligence Action Brought By A Minor.** This bill would significantly extend the Statute of Limitations in medical malpractice cases filed on behalf of minors.

We vigorously oppose this bill for four reasons. First, it significantly erodes if not eliminates the important protections that a Statute of Limitations is intended to create. Second, Connecticut lacks a statutory cap on damages which many of the states that have extended the statute of limitations for minors have adopted. Third, it will without question result in significantly increased malpractice premiums and cost of tail coverage. Fourth, it will contribute to the less than physician-friendly environment that already exists in Connecticut which increases the risk of reduced patient access to medical care due to physicians leaving the state or choosing not to practice here to start with. The impact will be to expose physicians to stale claims with significant financial exposure (namely, birth injury claims) that will be much more difficult to defend and will significantly increase the cost of practicing medicine in the state resulting in reduced access to medical care for the citizens of Connecticut.

Any consideration of increasing the amount of time in which a claim must be filed has to include a careful analysis of the impact it will have on the fairness to the parties. One of the most important policies for adopting a reasonable Statute of Limitations (SoL) is the concern that the passage of time will not only result in the deterioration of evidence but that it will also allow the plaintiff to gain an unfair advantage over the defendant. Many courts have rightfully acknowledged that one of the powerful purposes of SoL is to avoid making it unreasonably difficult for defendants to answer claims against them. There can be no doubt that increasing the SoL for minors to eight years to file a medical malpractice claim will significantly and negatively impact the defense of those claims.

Juries look to the physician to testify in detail about what he/she did and why he/she did it. There can be no doubt that a physician's ability to provide the detailed information juries are looking for and expect from the defendant physician will be adversely impacted. Eight years is a long time and even if the physician testifies that he or she has a specific recollection of the events or what he or she was thinking at the time, his or her testimony and credibility will be vigorously attacked by plaintiff's counsel on the basis that it is not possible to remember such details regarding events so remote. Either way, the physician loses. In addition, the risk of lost evidence and unavailable or unlocateable witnesses increases significantly to the detriment of the defense of the case.

Another significant risk to a lengthy SoL is that the case will be judged by the retrospective application of contemporary standards versus the standards in place at the time of the alleged omission or negligence which is one principle reasons for SoL – this is particularly applicable to medical malpractice cases due to the fact the standard of care in medicine is constantly evolving. What was standard of care eight years ago may now considered a breach of the standard of care. Professors Tyler Ochoa and Andrew Wistrick state it best in their law review article *The Puzzling Purposes of the Statute of Limitation:* "...it is notoriously difficult, if not impossible, for judges and juries to put present-day standards out of their minds and to avoid second-guessing the actions or omissions of others with the benefit of hindsight" by measuring conduct by contemporary standards.

The bottom line is that to increase the time limitation SoL in medical liability cases by 300%, regardless whether it is limited to minors, is to all but eliminate the protections that the SoL is intended to establish to insure a fair process for all parties. We strongly encourage this committee to take into account the profound negative impact the proposed legislation will have on a physician's ability to defend a medical malpractice claim brought by a minor many of which will no doubt involve significant neurologic injuries. These cases in particular require the defense to have access to all the evidence including the physician's best recollection of the care he or she provided that is at issue in the case. Finally, lengthening the SoL for minors would potentially increase the costs of litigation for the defendant due to increased efforts to track down evidence and witnesses who may no longer reside in Connecticut.

Another important consideration in evaluating the potential risks in extending the statute of limitation for minors is that Connecticut has no cap on recovery whereas 28 of the states[1] in which the Statute of Limitation has been extended have statutory caps on non-economic damages ranging from $350,000 to $1M. It would be mistake to analyze this propose bill in a vacuum. Proposed changes to the tort system – especially such a significant one must be evaluated in the context on what other statutes exist that protect against potentially significant liability exposure. Connecticut clearly lacks the protection that other states have in limiting awards in medical malpractice cases. In addition, it seems clear that the proposed legislation is aimed to extend the statute of limitation in particular for birth injury claims which pose the greatest economic threat to physicians since rewards far exceed the physician insurance policies. However, there is no evidence that these potential claims often go undetected or undiscovered until the present statute of limitations has run. In fact, birth injuries are in almost all cases immediately appreciated and result in specialized care and testing. In addition, there are numerous experienced plaintiffs' attorneys who services and ability to vigorously investigate and pursue these claims are well known. There is no statistical or empirical evidence to support extending the statute of limitation for minors and to disregard the important safeguards that the present statute has in place to insure a fair process for all parties.

With respect to the potential impact that the proposed legislation will have on physician premiums and the cost of tail coverage, you don't have to be an insurance actuarial expert to conclude that the proposed legislation will result in increased premiums (in some practice areas like obstetric significantly increased premiums) and much more costly tails. There is also little doubt that these increased costs will result in physicians abandoning certain practice areas, retiring early or leaving the state and other physicians deciding not to come to Connecticut to practice. Who ultimately suffers? – The citizens of the State of Connecticut who will have less access to care. Plain and simple, what may appear to be a well intentioned good idea is a bad bill with enormous negative implications for both physicians and patients in Connecticut.

On behalf of CSMS and its members, please reject Senate Bill 1028

[1] Alaska, California, Colorado, Florida, Hawaii, Idaho, Indiana, Kansas, Maine, Maryland, Michigan, Mississippi, Massachusetts, Montana, Nebraska, New Mexico, New Jersey, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia and Wisconsin